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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEZLIE ANN BUTTON, Plaintiff - Appellant, v. BOARD OF REGENTS OF UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA; et al., Defendants - Appellees.	No. 06-16231 D.C. No. CV-04-01307-HDM/PAL MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted March 12, 2008
Phoenix, Arizona
Submission Vacated March 13, 2008
Submitted August 4, 2008

Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

Plaintiff-Appellant Lezlie Button ("Button") appeals the adverse summary judgment grant on her Americans with Disabilities Act ("ADA") and Rehabilitation

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Act claims, arguing genuine issues of material fact exist about whether the Community College of Southern Nevada ("CCSN") and the University of Nevada, Las Vegas ("UNLV") (collectively "The Board")[1] provided reasonable accommodations to ensure equal access in the classroom or acted with deliberate indifference.[2]

Whether reasonable accommodations have been provided is ordinarily a question of fact. Fuller v. Frank, 916 F.2d 558, 562 n.6 (9th Cir. 1990). Whether a particular accommodation is reasonable depends on the individual circumstances of each case and requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations necessary to meet the program's standards. Vinson v. Thomas, 288 F.3d 1145, 1154 (9th Cir. 2002).

Reasonable Accommodation

1. Spelling 095

A triable issue of fact exists with respect to whether the institution provided Button with a "qualified interpreter" for this class. Button complained about the quality of interpreters on a number of occasions. Although the institution agreed to

[1]The Board of Regents of the CCSN and UNLV are considered the same entity.

[2]There is no dispute that Button is *capable* of a strong academic performance–after her experience at CCSN and UNLV, she transferred to the State University of New York in Cortland, where she made the Dean's List.

use Debra Scott's interpreting services for some classes as Button requested, the record reflects that Button complained about the quality of interpreters and the spotty attendance of interpreters on several occasions. In one e-mail, Button notes, "I already gave FIVE months for you to arrange to search [for] an interpreter . . . ." Button's expert testified that "the institutions in this case did not respond in a timely enough manner." The e-mail exchange, in combination with the expert testimony, points to a triable issue of fact as to whether the accommodations offered in response to Button's requests were reasonable.

2. Environmental Science

College officials acknowledged some insufficiency in note taking; at one point the administration sent an e-mail explaining that they had been looking for a "legitimate" note taker and finally found one. This indicates that there was a substantial period of time during which a "legitimate" note taker was not provided.

Button's e-mails confirm that she raised concerns about the delay in finding an adequate note taker. Button's expert also concluded that the institution's response was not adequate, stating that, while a single missed note taker might be understandable, it is not excusable "[w]hen you have a whole series of courses where note takers [and] notes were never provided, there is a problem, and it's a systemic

problem . . . ." This indicates that there is a triable issue of fact regarding whether the Board's actions constituted "reasonable accommodations" of Button's requests.

3. Global Economics

With respect to Global Economics, the district court concluded that there was no evidence that Button complained about Dr. Robinson's speaking speed after the institution sent him a letter asking him to slow down. However, the evidence is undisputed that Button requested Real Time Captioning ("RTC") instead of an interpreter for this class, which was not provided. It appears the district court addressed only the initial RTC request and not the one made in the Global Economics class. The court justified the denial of the UNLV RTC request by stating that RTC in addition to an interpreter would be duplicative. However, in the e-mails pertaining to her Global Economics class, Button specifically requested RTC instead of an interpreter for this class. The institution apparently looked into the possibility of RTC but found it was not available. The stated lack of availability is odd in light of CCSN's utilization of RTC for her spelling class when an interpreter was unavailable. Button's expert also stated that when the quality of interpreters and note takers is spotty the school "does have the responsibility to have some kind of back-up plan." Given Button's continual e-mail complaints that she was unable to keep up with the

class, in conjunction with the expert testimony, there is a genuine issue of material fact as to whether the university's response constituted a reasonable accommodation.

4. UNLV RTC Request

Button's expert stated that the institution's summary denial of the RTC in conjunction with note taking and interpreters was inappropriate because administrators did not try to determine why Button believed all three services were necessary. The Board's expert, on the other hand, opined that "it is totally inappropriate to have both [interpreters and RTC] at the same time." A conflict in expert testimony is a quintessential dispute of material fact. See e.g., Schroeder v. Owens-Corning Fiberglas Corp., 514 F.2d 901, 903-904 (9th Cir. 1975). The Board does not argue that Button's expert was unqualified. Rather, it argues that her testimony is not supported by sufficient record evidence. However, different inferences could be drawn from the record evidence. See Linn Gear Co. v. N.L.R.B., 608 F.2d 791, 796 (9th Cir. 1979).

The institution's denial and the reasons for the denial are undisputed, but there is no legal or factual barrier preventing a jury from reasonably concluding that the university's response constituted a denial of a reasonable accommodation. "[M]ere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement; [both the ADA and the Rehabilitation Act]

create a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary . . . ." Duvall v. County of Kitsap, 260 F.3d 1124, 1136 (9th Cir. 2001) (quoting Wong v. Regents of the University of California, 192 F.3d 807, 818 (9th Cir. 1999) (omission in original)). The denial of a request for accommodation "without consulting [plaintiff] or any person at the University whose job it was to formulate appropriate accommodations" has been found "a conspicuous failure to carry out the obligation 'conscientiously' to explore possible accommodations." Wong, 192 F.3d at 819.

Deliberate Indifference

To recover money damages, Button must show that the institution acted with "deliberate indifference," which requires both "knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood." Duvall, 260 F.3d at 1139. A denial of a request without investigation is sufficient to survive summary judgment on the question of deliberate indifference. See id. at 1139-41. In Duvall, the court stated, "if [plaintiff's] account of the timing and content of his requests for accommodation and defendants' reactions thereto are accurate, a trier of fact could conclude that defendants' decisions not to accommodate him were considered and deliberate." Id. at 1141. There, the plaintiff contacted the ADA coordinator of the court to request RTC; the coordinator responded that the courtroom

would be equipped for the hearing impaired but that the plaintiff would have to file a motion for further accommodation; plaintiff made such a motion, and the judge denied it because they did not have the technology, and instead allowed the plaintiff to move about the courtroom freely wherever he could best hear the proceedings. Id. at 1131.

We cannot say that, if the jury concludes that the Board's accommodations were not reasonable, the jury could not also conclude that the Board's failure to provide greater accommodations was not "deliberate and considered," particularly in light of the Board's summary denial of Button's RTC request. It is not enough that the Board took some action–in Duvall the court made some effort to accommodate, but we held that a jury could find this effort both insufficient and deliberate. See id. This inquiry is nuanced and fact-intensive–precisely the province of the jury.

Disputed issues of material fact preclude summary judgment.

REVERSED and REMANDED.